STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2003
v	No. 233785 St. Clair Circuit Court
JOSEPH MATTHEW GREER, Defendant-Appellant.	LC No. 00-002993-FC

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right and we affirm.

I

Defendant was convicted of the shooting death of Tee Jay Tucker on September 10, 2000. There were no eyewitnesses, and no weapon was positively identified, but the evidence indicated that the shooting was committed by a skilled sniper. The prosecutor's theory of the case was that defendant shot Tucker because Tucker owed money to defendant's mother. The defense maintained that defendant was not involved in the shooting.

The prosecution's case against defendant included testimony that he not only indicated his intent to collect the debt he believed the victim owed his mother, but that he made specific threats that he intended to and later that he did carry out a "hit" on the victim, and that on the day of the shooting, defendant and his brother were involved in a loud, angry confrontation with the victim and some of his friends. In addition, spent shell casings found where police determined the shooter fired from matched other casings found at defendant's home and his personal shooting range.

II

At trial, defense counsel requested a mistrial after a witness injected testimony about having taken a polygraph test, and because the prosecutor made excessive capital of the way the police investigation excluded suspects other than defendant. We find no error warranting reversal.

This Court reviews a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *Id.* (citations omitted).

September 10, 2000 was a Sunday. The shooting occurred at the Lumpford farm where the victim and his friends, Randy and Larry Lumpford, had worked, consumed alcohol and smoked marijuana during the weekend.

At trial, Randy Lumpford testified about his dealings with the police after they responded to the homicide. Lumpford admitted that he had passed out from drinking before the shooting and that his mother awakened him to say that she thought the victim had committed suicide. Lumpford was arrested at the scene when he tried to cross the police yellow tape line to put a blanket over his friend's body. He was still intoxicated at that time. When the prosecutor asked if he had sobered up "at some point." Lumpford replied, "Through the night, yeah. The next day the detectives came and talked to me some more and then asked me if I'd take a polygraph, and I agreed. No problem. We went and took it, and they let me go." Defense counsel immediately asked for a recess and moved for a mistrial after the jury was excused.

It is a "bright-line rule" that mention before a jury of taking or passing a polygraph examination is error. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). However, not every reference to a polygraph examination necessarily constitutes error requiring reversal. *Id.* at 98. For example, when the mention of a polygraph examination is nonresponsive, or in any event brief, inadvertent, or isolated, it may not require reversal. *Id.* In determining whether a mistrial is warranted because of such improper mention, a court must consider whether the defendant objected or sought a cautionary instruction, whether the reference was inadvertent, whether there were repeated references, whether the mention was an attempt to bolster a witness' credibility, and whether the results of the test were admitted as opposed to mere mention that a test was taken. *Id.* at 98-101.

In this case, defense counsel immediately responded to the polygraph reference and moved for a mistrial. Counsel protested that the clear implication was that this witness was cleared by a police polygraph procedure, and that that witness—himself a possible alternative suspect in the charged homicide—thus introduced his polygraph experience to bolster his own credibility. Counsel further pointed out that the prejudice could not be fully gauged, because the jurors had not been questioned concerning their views on polygraph tests. Counsel additionally made clear that, beyond her request for a mistrial, she could think of no suitable relief, insisting that the jury could not be expected to disregard what they heard, and expressly acknowledging that to provide any sort of curative instruction would be to call further attention to the inappropriate mention of the polygraph test. The prosecutor opposed a mistrial.

The trial court adjourned the trial to allow counsel to prepare legal arguments on the questions of whether a mistrial was indicated or whether a curative instruction was required. Later in the day arguments were heard. Based on the factual context and the legal authorities cited, the trial court denied the motion for mistrial. There was then considerable discussion of whether a curative instruction should be given to the jury. Defense counsel declined the court's offer to give an instruction. When the jury returned and the witness resumed the stand, no further mention was made of the polygraph.

The trial court did not abuse its discretion in denying defendant's motion for mistrial. The single, brief, unsolicited, inadvertent reference to the polygraph did not serve to deprive defendant of a fair trial. Even if the witness was attempting to bolster his own credibility, his testimony was virtually irrelevant to the question of defendant's guilt and his credibility was not in issue. We are not persuaded by defendant's claim that the witness himself might have been responsible for the shooting and that his attempts to show that he was excused after he took a polygraph were part of an effort to distance himself from any potential criminal liability. Nor are we persuaded that this testimony in any way amounted to improper vouching by the prosecutor for the witness' credibility. There was considerable evidence pointing to defendant's guilt. Defendant's claim that the reference to the polygraph amounted to an error so serious that it deprived him of a fair trial is simply not credible.

Moreover, a jury is entitled to learn the "'complete story'" of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). The portions of opening statements, testimony from the police officer, and closing arguments of which defendant makes issue, along with the trial court's instructions and other responses, considered in isolation or collectively, do not add up to error requiring reversal. The prosecutor was merely providing a complete picture of the background of the case for the jury.

The trial court instructed the jurors on the presumption of innocence, including that "[t]he fact that the Defendant is charged with a crime and is on trial" is not evidence of guilt. The court additionally informed the jurors that the statements of counsel are not evidence.

III

Defendant argues that the trial court erred in denying his request for a jury instruction on a lesser included offense. The trial court properly declined to provide an instruction on reckless discharge of a firearm resulting in death.

At the close of proofs, the trial court instructed the jury on first-degree premeditated murder, and on the necessarily included lesser offense of second-degree murder. The trial court denied a defense request to instruct the jury additionally on reckless or negligent discharge of a firearm causing death, a two-year misdemeanor. MCL 752.861.

A requested instruction on a necessarily included lesser offense, that comports with a rational view of the evidence, must be provided. *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002), citing MCL 768.32(1). However, an instruction on a cognate lesser included

offense is not permitted. *Id.*[1] See also *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

Reckless discharge causing death is a cognate lesser offense of second-degree murder. *People v Beach*, 429 Mich 450, 462-463; 418 NW2d 861 (1988). Because reckless discharge causing death is not a necessarily included offense of murder, the trial court properly denied the requested instruction.

IV

Defendant complains that evidence of his ownership and use of weapons as well as references to his "bunker" and other evidentiary matters were prejudicial. We disagree.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 695 (1995). However, unpreserved issues are reviewed for plain error affecting substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant complains about the extent to which the jury was exposed to evidence of his appreciation for and experience and expertise in operating firearms and other weaponry. However, defendant himself freely testified about his weaponry on direct and cross-examination indicating that the defense did not regard defendant's affinity for firearms as unduly prejudicial.

Further, defendant's extensive familiarity with such weaponry was relevant to the question of his guilt because the victim was apparently shot by a skilled sniper with sophisticated equipment. In addition, as plaintiff points out in his brief on appeal, because no specific murder weapon was identified and placed into evidence, the prosecutor needed to show that defendant owned sufficient numerous weapons that, had defendant disposed of any one of them, the resulting depletion of defendant's arsenal would not be a conspicuous development.

Defendant also complains that various weapons were improperly left in view of the jury. However, the guns in question were admitted into evidence without objection and when defense counsel objected to their placement in the courtroom, the court ordered that the weapons "be removed from that location," and defense counsel responded, "[t]hat's fine".

Defendant's remaining allegations of evidentiary error were either unpreserved for appellate review or related to matters of his own reference. No error occurred with regard to these issues. In any event, the trial court instructed the jurors not to let prejudice influence their decision. "It is well established that jurors are presumed to follow their instructions." *People v*

---

[1] Although the decision in *Cornell* was given limited retroactive effect, it applies to this case because the issue was raised and preserved below and this case was pending on appeal when *Cornell* was decided. *Cornell, supra*, 466 Mich at 367.

Graves, 458 Mich 476, 486; 581 NW2d 229 (1998). To any extent that the jurors might have been unduly prejudiced against defendant because of implications that the latter inclined toward Nazis, Aztecs, cults, or anarchists, the instruction on point should have cured that tendency.

V

Defendant also argues that the prosecutor improperly sought to illicit sympathy for the victim. It is well established that a prosecutor may not urge a jury to convict out of sympathy for the victim. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, our review of the record leads us to conclude that the complained of conduct, almost all of which was not challenged at trial, amounted to no more than the prosecutor's permissible presentation of his case and argument of the reasonable inferences arising from the evidence. *Bahoda, supra* at 282.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly